(9)

No. 118, Original

In The

Supreme Court of the United States

October Term, 1991

UNITED STATES OF AMERICA,

Plaintiff,

v.

STATE OF ALASKA,

Defendant.

REPLY BRIEF OF THE STATE OF ALASKA IN SUPPORT OF ITS MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The United States has filed a motion to quiet title to certain submerged lands off a coastal causeway constructed by the City of Nome in Norton Sound, Alaska. Prior to construction of the causeway, the lands were beyond three miles of the coastline of Alaska. After construction, the lands in question came within three miles of the coastline. The Submerged Lands Act grants the States title to all submerged lands within three miles of the coastline.

The Army Corps of Engineers ("Army Corps") refused to issue a permit for construction of the Nome Causeway unless Alaska disclaimed its title to the disputed lands. Alaska thereafter submitted a disclaimer subject to judicial review. The United States' arguments have failed to refute the central premise in this case: Congress never authorized the Army Corps to exact unilateral changes in the offshore boundaries established by the Submerged Lands Act.

ARGUMENT

I. THE ARMY CORPS LACKS AUTHORITY TO CONTRAVENE CONGRESS' GRANT OF SUBMERGED LANDS TO THE STATES

A. The Army Corps Must Conform Its Practices to the Submerged Lands Act

This case is controlled by a simple proposition of law: what Congress has given the States in the Submerged Lands Act, the Army Corps cannot take away through its

interpretation of the Rivers and Harbors Act. The Submerged Lands Act of 1953 ("SLA") establishes that the boundary of a coastal state extends seaward "to a line three geographical miles distant from its coast line." 43 U.S.C.A. § 1312 (1986 & Supp. 1991). Significantly, the SLA declares that its grant of title to submerged lands is "in the public interest." 43 U.S.C.A. § 1311(a)(1) (1986). The Rivers and Harbors Appropriation Act of 1899 ("RHA") prohibits obstructions "to the navigable capacity of any of the waters of the United States" except as permitted by the Army Corps. 33 U.S.C.A. § 403 (1986). Congress authorized the Army Corps to safeguard the navigability of the nation's waters. It did not exempt the Army Corps from obeying other acts of Congress.

The seaward boundary of state-owned lands is measured from a baseline that is not fixed.[1] Rather, as the United States admits, the coastline is ambulatory, even if the ambulations occur as a result of artificial alterations.

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[1] 2 A. Shalowitz, *Shore and Sea Boundaries* 359 (1964). Shalowitz notes that natural forces cause both gradual and radical changes in the coastline. For example, gradual changes have extended the coastline of the eastern portion of the Mississippi delta by 10 miles in 100 years. As an example of a radical change, in March 1962, a "severe northeaster" moved the coastline from several hundred feet to up to 0.4 miles in several places along the Eastern Seaboard. *Id.* at 359-60. The Alaska earthquake of 1964 also had dramatic effects on the coastline. G. Plafker, *The Alaska Earthquake, March 27, 1964, Regional Effects, Tectonics*, United States Geological Survey Professional Paper No. 543-1 (U.S. Gov't Printing Office 1969).

See Brief of Pl. at 6, 25-27; *see also United States v. California*, 381 U.S. 139, 176-77 (1965) (*"California II"*); *United States v. Louisiana*, 394 U.S. 11, 40 n.48 (1968) (*"Louisiana Boundary Case"*) (artificial coastal accretions modify the coastline even when not permitted by the Army Corps).[2] The grant of submerged lands to the States, and the principles interpreting the grant, are matters of federal law. As an administrative agency, the Army Corps may not alter the rights granted to the States by Congress. *Cf. Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 376 (1986) (where an act of Congress gives authority to the States, a federal agency cannot change that result; "only Congress can rewrite this statute").

The congressional allocation of rights between the States and the United States in the SLA controls the resolution of this case. The RHA confers no authority for the Army Corps to redistribute the balance of interests struck by Congress that reflect principles of federalism. *See Kake Village v. Egan*, 369 U.S. 60 (1961). In *Kake Village*, the Army Corps had issued permits under the RHA for certain Indian communities to operate fish traps. *Id.* at 63. However, these traps were illegal under State law, and this Court found that the Alaska Statehood Act granted responsibility for fisheries regulation to the State. As a result, the permitting authority of the Army Corps could have no effect on the State-Federal relationship established by the Statehood Act. *Id.* at 63, 76. Similarly, here the balance of federalism in the SLA confers certain rights

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[2] The ambulations are in accordance with fixed rules of international law. *See California II*, 381 U.S. at 176-77.

upon the States. The Army Corps' permitting authority cannot alter that balance.

B. The Outer Continental Shelf Lands Act Does Not Take Precedence over the SLA

The United States argues that the Army Corps may deny SLA grants to the States because of the Outer Continental Shelf Lands Act of 1953 ("OCSLA"), 43 U.S.C.A. § 1331 (1986). The OCSLA provides that "the outer Continental Shelf is a vital *national* resource reserve held by the *Federal Government* for the *public*." Brief of Pl. at 25 (quoting 43 U.S.C. § 1332(3)) (emphasis added by United States). The United States argues that allowing coastal construction projects to extend the State's submerged lands into portions of the former outer continental shelf "would prejudice the rights of the national citizenry, in violation of the express policy of the Outer Continental Shelf Lands Act, in favor of the citizens of a single coastal State." Brief of Pl. at 25-26. Such a result, it contends, would be "at odds" with the "overriding purpose of protecting important national interests." *Id.*

Congress has not so spoken. To the contrary, the SLA and the OCSLA are in complete harmony. The "outer Continental Shelf" is defined within the SLA as "that portion of the subsoil and seabed of the Continental Shelf lying seaward and outside of the area of lands beneath navigable waters, as defined in section 1301 of this title. . . ." 43 U.S.C.A. § 1302 (1986). The OCSLA incorporates the same language. 43 U.S.C.A. § 1331(a) (1986). *See also Zabel v. Tabb*, 430 F.2d 199, 205 (5th Cir. 1970), *cert.*

denied, 401 U.S. 910 (1971) ("The [SLA] and this relinquishment [of title from the United States to the States] reflect the legislative compromise found in the combination of the Submerged Lands Act and the Outer Continental Shelf Act.").

Thus, the United States' asserted "vital national interest" in a fixed boundary for the outer continental shelf is illusory. By definition, the outer continental shelf automatically lies outside the seaward limit of a State's submerged lands. Congress has determined that the national interest is served by three miles of state-owned submerged lands, 43 U.S.C.A. § 1311(a)(1) (1986), and by an outer continental shelf which begins beyond this State boundary. 43 U.S.C.A. § 1332(3) (1986). Given the United States' admission that the Army Corps must adhere to acts of Congress in its permitting decisions, Brief of Pl. at 21-22, the declaration of the public interest in the SLA conclusively resolves this case in Alaska's favor.

C. The Army Corps' Disclaimer Requirement Contravenes the Public Policy of a Single Coastline

The unilateral action of the Army Corps under the RHA to demand disclaimers creates an uncertain coastline. This "would create uncertainty and encourage controversy" contrary to the public policy of a single coastline.[3] Offshore jurisdiction becomes uncertain. To

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[3] *Louisiana Boundary Case*, 394 U.S. at 34. *See also California II*, 381 U.S. at 165-66; *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 481 (1988) (extolling the benefit of "uniformity and certainty, and ease of application" in rules establishing tideland boundaries).

determine jurisdiction, mariners will need to know whether or not a coastal addition has been the subject of a disclaimer. Disclaimers, however, do not appear on navigation charts.[4]

The SLA not only encompasses ownership of submerged lands but also reaches management of natural resources within the lands and waters. 43 U.S.C.A. § 1311(a)(1) (1986). Unstable and unpredictable administrative rules will create confusion in many areas. For example, States manage fishing operations within the three-mile limit, and the United States has jurisdiction over fishing activities outside "the seaward boundary of

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[4] The discovery of the existence of disclaimers is made more formidable because projects initially permitted without waivers are sometimes later subjected to waiver requirements. *See, e.g.*, Lodging of the Parties at no. 5 (West Dock, Alaska Phase III (Dec. 1, 1980): disclaimer requested for this final phase required that Alaska disclaim title to the earlier submerged lands accretions). Thousands of other existing coastal projects could become subject to the Army Corps' retroactive disclaimer practice as new permits are needed for extensions, modifications, repairs, etc. *See, e.g., United States v. California*, 432 U.S. 40, 41-42 (1977) (listing of 20 artificial structures).

each of the coastal States."[5] Salvage operations[6] and criminal jurisdiction[7] are also affected.

The United States asserts that the single boundary policy can be the subject of "agreement between the parties." Brief of Pl. at 26 (citing *California II*, 381 U.S. at 176). The United States misconstrues this Court's suggestion in *California II*. While both *California II* and the *Louisiana Boundary Case* speak of agreements between the parties which could freeze the coastline, both cases also embrace a strict adherence to the public policy of a single coastline. *Louisiana Boundary Case*, 394 U.S. at 34; *California II*, 381 U.S. at 176. The certainty sought by this Court can be achieved only by comprehensive agreements which establish an historical, or otherwise identifiable, single coastline for an entire State. This Court did not

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[5] *See* Magnuson Fishery Conservation and Management Act of 1977, 16 U.S.C.A. § 1811 (1985). The United States claims jurisdiction over all fish within the exclusive economic zone ("EEZ") to 200 miles. The EEZ begins at "a line coterminous with the seaward boundary of each of the coastal States." *Id.* at § 1802(6) (Supp. 1991). The States' fisheries jurisdiction extends to the same seaward boundary at three miles. *See, e.g.*, Alaska Stat. 44.03.010 (1989); *State v. F/V Baranof*, 677 P.2d 1245 (Alaska 1984), *cert. denied*, 469 U.S. 823 (1984); *F/V American Eagle v. State*, 620 P.2d 657 (Alaska 1980), *appeal dismissed*, 454 U.S. 1130 (1982).

[6] *See* Abandoned Shipwreck Act of 1987, 43 U.S.C.A. § 2101 (Supp. 1991) ("The Congress finds that – (a) States have the responsibility for management of a broad range of living and nonliving resources in State waters and submerged lands; and (b) included in the range of resources are certain abandoned shipwrecks . . . ").

[7] *See, e.g., Corbin v. State*, 672 P.2d 156 (Alaska 1983), *appeal dismissed*, 467 U.S. 1223 (1984).

endorse adoption of random coastal disclaimers which abrogate the certainty of the single coastline formula. Moreover, nothing in the language of *California II* or the *Louisiana Boundary Case* suggests that such agreements are possible without congressional amendment of the SLA.

Finally, even if agreements are allowable under current law, *California II* did not authorize the Army Corps unilaterally to freeze the coastline as a condition for coastal development. *See* 381 U.S. at 176. Other than the disclaimer, Nome satisfied the conditions for its causeway. Joint Stipulation of Facts at 2-3. No further negotiation or agreement, especially with third parties, is necessary. In addition, without specific legislation, the Army Corps lacks authority to enter into negotiations or agreements regarding the location of the coastline for SLA purposes. The Army Corps has authority to issue permits under the RHA, not to negotiate rights under the SLA.

D. Exceptions in the SLA Do Not Authorize the Army Corps to Require Waivers of States' Rights

The United States mentions that the SLA "expressly retained 'all [of the United States'] navigational servitude and rights in and powers of regulation and control of said lands and navigable waters for the constitutional purposes of commerce, navigation, national defense, and international affairs.' " Brief of Pl. at 6 (quoting 43 U.S.C. § 1314). These exceptions provide no support to the United States' position. To the contrary, these exceptions prove the rule that the Army Corps has no authority to interfere in SLA grants.

The United States does not dispute that the rationale of the Army Corps in requiring this disclaimer has nothing to do with commerce, navigation, national defense, or international affairs. *See, e.g.*, Brief of Pl. at 25-26. It is a rule of statutory construction that when statutes include specific terms, terms not included in the enumeration are presumptively excluded. 2A N. Singer, *Sutherland Statutory Construction* § 47.23 (4th ed. 1984) ("The enumeration of exclusions from the operation of a statute indicates that the statute should apply to all cases not specifically excluded."). Had Congress wished to make an exception to the SLA for alterations in the State-Federal boundary, it could have done so in the statute.

E. Congress' Grant of Submerged Lands and the Declaration of the Public Interest in the SLA Preclude the Army Corps from Demanding Disclaimers as a Condition for Coastal Development

In conclusion, this case is entirely controlled by the SLA. In the SLA, Congress has already balanced the public interest:

> It is hereby determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be . . . recognized, confirmed, established, and vested in and assigned to the respective States . . . .

43 U.S.C.A. § 1311(a)(1) (1986).

Here, the Army Corps withheld a permit for a coastal construction project solely to prevent a statutory grant of submerged lands. See Joint Stipulation of Facts at 2-3, 18a-19a, 22a-23a, 24a, 33a-37a; Brief of Pl. at 12. Lacking any statutory authority for this action, the Army Corps has baldly asserted that it "balanc[ed] the favorable impacts against the detrimental impacts" in its reapportionment of SLA rights. Brief of Pl. at 22 (quoting 33 C.F.R. § 320.1). *See also id.* at 13-14, 23-25. However, no balancing has occurred here. Instead, the Army Corps has ignored the overwhelming "favorable impacts" of the Nome Causeway, and chosen to focus only on a supposed "public interest" in preserving the existing State-Federal boundary. Far from being a pre-decisional balancing, the Army Corps' "public interest" review is a *fait accompli*.

Congress, not the Army Corps, defines the public interest. Accordingly, the Army Corps may not substitute its judgment for that of Congress and require that States disclaim their interests in submerged lands as a condition to coastal construction permits. The disclaimer required of Alaska is therefore void. Title to the submerged lands should be determined in accordance with the SLA.

II. NEITHER THE RHA NOR OTHER ACTS OF CONGRESS PERMIT THE ARMY CORPS TO DENY THE NOME CAUSEWAY APPLICATION ON THE BASIS OF CHANGES TO THE STATE-FEDERAL BOUNDARY

The United States argues that the RHA grants the Secretary of the Army ("Secretary") broad discretion to deny applications for coastal construction projects that

affect the State-Federal offshore boundary. However, the SLA does not permit the Army Corps to negate the States' submerged lands entitlements. Therefore, this Court need not reach the issue of the scope of the Secretary's authority under the RHA. Nevertheless, even disregarding the preclusive effect of the SLA, the RHA, especially when read in conjunction with other acts of Congress, does not permit the Secretary to deny permits solely because of changing State-Federal boundaries.

A. The RHA Explicitly Limits Permitting Decisions to Consideration of "Navigable Capacity"

The United States argues that Section 10 of the RHA "commits the identification of relevant factors to the discretion of the Secretary of the Army." Brief of Pl. at 16. Alaska agrees that the Secretary of the Army may undertake a public interest review prior to issuing permits under the RHA and that the Secretary has discretion in issuing permits. Here, however, the Secretary has abused his discretion by considering factors which no congressional statute authorizes him to consider.

The United States' attempt to confer extra-statutory discretion on the Secretary ignores the important qualification that Section 10 of the RHA concerns obstructions "to the navigable capacity of any of the waters of the United States." 33 U.S.C.A. § 403 (1986). The Army Corps itself traditionally has acknowledged that its authority under the RHA must focus on navigational issues. *See* 42 Fed. Reg. 37,122 (1977) ("Until 1968, the Corps administered the 1899 Act regulatory program only to protect navigation and the navigable capacity of the nation's

waters."); Brief of Pl. at 22. *See also Wisconsin v. Illinois*, 278 U.S. 399, 418 (1928) (noting "the limited scope of the Secretary's authority" under the RHA, and that the Army Corps could not make local sanitation a basis for a permit under Section 10 of the RHA unless it had a concomitant benefit on navigation). *Cf. Lyng v. Payne*, 476 U.S. 926, 937 (1986) ("an agency's power is no greater than that delegated to it by Congress"); *United States v. Chicago, M., St.P. & P. R.R.*, 282 U.S. 311, 326 (1930) (Interstate Commerce Commission, when authorizing issuance of stock, could not impose a condition that "was not within the purview of the regulating power of the Commission").

Thus, decisions made under the aegis of the RHA must be grounded upon a concern for the integrity of the navigable waters or grounded upon other acts of Congress. Here, the United States admits that it denied the Nome causeway permit solely because of the project's effect on title to submerged lands. Brief at Pl. at 23-25. Such considerations are beyond the purview of the Army Corps' authority under the RHA.

B. Other Statutes Also Limit the Secretary's Permitting Decisions

In 1968, the Secretary of the Army revised and reorganized all regulations governing the permitting programs of the Army Corps. The revisions recognized that the Army Corps' permitting authority is limited by various statutes, including the RHA. *See* 42 Fed. Reg., *supra*, at 37,122. *See also* 33 Fed. Reg. 18,671 (1968) (coordination required because of the interrelationship of responsibilities of the Secretary of the Army under the RHA and

the Secretary of the Interior under the Federal Water Pollution Act, the Fish and Wildlife Coordination Act, and the Fish and Wildlife Act of 1956).

The "rapidly changing nature of the Corps' regulatory programs," 42 Fed. Reg., *supra*, at 37,122, was based on specific statutory authorities. The United States does not dispute the role of these statutes: "[t]he Secretary must now act in the face of an extensive body of federal law establishing, among other things, national policies concerning environmental matters and natural resource development." Brief of Pl. at 21-22. In fact, Plaintiff and Defendant provide nearly identical catalogs of these many laws that impact and limit the Army Corps' discretion. *See* Brief of Pl. at 22; Brief of Def. at 18-19; *See also* 51 Fed. Reg. 41,222-23 (1986).

Even before the advent of environmental awareness, this Court affirmed the impact of other statutes on the administration of the RHA. For example, in 1933, this Court decreed that the Army Corps, in considering a permit application under the RHA, could not disregard an act of Congress that affected the site of a proposed wharf. *United States ex rel. Greathouse v. Dern*, 289 U.S. 342 (1933) (where Congress acted to appropriate $7,500,000 to build the George Washington Memorial Parkway, the Secretary of the Army could deny a permit under the RHA for the nonnavigable reason that a proposed wharf would be in the path of the Parkway construction).

The United States cites *United States v. Pennsylvania Indust. Chem. Corp.*, 411 U.S. 655 (1973), as "further reinforc[ing] the conclusion that the Secretary is not narrowly confined under Section 10 . . . to considering only factors

bearing on navigation." Brief of Pl. at 18. However, *Pennsylvania Chemical* was not a permitting case. Instead, this case merely held that the absence of implementing regulations does not preclude the Army Corps from instituting prosecutions under former Section 13 of the RHA (prohibiting the discharge or deposit of refuse into navigable waters). *Pennsylvania Chemical*, 411 U.S. at 669. In establishing the breadth of this prosecutorial discretion, this Court noted that, in the absence of clarifying regulations, the Secretary could decline to permit an activity even though it would "not injure anchorage and navigation." *Id.* at 662. Because *Pennsylvania Chemical* concerned prosecution, and not permitting, this Court did not elaborate on the scope of the Army Corps' permitting authority under the RHA.[8]

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[8] The United States also cites to *Jay v. Boyd*, 352 U.S. 345, 353-54 (1956), and *Webster v. Doe*, 486 U.S. 592, 600 (1988), in support of the Secretary's discretion. Brief of Pl. at 16-17. These cases are inapposite, as each represents instances of unreviewable discretion. The United States does not assert that the RHA grants unreviewable authority to the Army Corps. Indeed, no such assertion is possible. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410-11 (1971) (administrative decisions are subject to judicial review except in two rare circumstances: (1) there is clear and convincing Congressional intent to restrict access to judicial review; (2) the statute is drawn in such broad terms that there is no law to apply). Thus, except in rare circumstances, "[t]he court is first required to decide whether the Secretary acted within the scope of his authority." *Id.* at 415. Indeed, in arguing that the Secretary can consider factors beyond navigation, the United States notes that " 'there must be a reason [for denying a permit].' " Brief of Pl. at 21 (quoting *Zabel*, 430 F.2d at 208).

Finally, contrary to the United States' contentions, there is no congressional void or silence that allows the Secretary to adopt his own public interest criteria outside of the statute. *See* Brief of Pl. at 14, 16. Indeed, the many congressional enactments affecting navigable waters give the Secretary ample guidelines for the implementation of the RHA. This Court should reaffirm the force of these authorities and their application to the Army Corps.

CONCLUSION

For the reasons given above and also as presented in the State of Alaska's Brief in Support of its Motion for Summary Judgment, this Court should grant Alaska's Motion for Summary Judgment and deny the United States' motion.

Respectfully submitted,

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